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2018 EMPLOYMENT LAW CONFERENCE
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**WHEN THE SMOKE CLEARS:
MARIJUANA IN THE WORKPLACE**
SESSION 2

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AGENDA

- Introduction | Statistics
- Medical vs. Recreational Marijuana
- Legalization | Prohibitions
- What It Means for Employers
- Drug Testing Policy
- Recent Developments
- Conclusion

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1



STATISTICS

- Drug use in the workplace costs employers billions of dollars every year in lost productivity, increased health problems, and workplace accidents.
 - National Drug Free Workplace Alliance
- 80% of drug abusers steal from their workplace to support their drug use.
 - National Drug Free Workplace Alliance
- Marijuana users have 85% more work-related injuries and 78% greater work absenteeism, and their chances of industrial accidents are increased by 55%.
 - National Institute on Drug Abuse

aalrr 3



MEDICAL MARIJUANA IN CALIFORNIA

- CA was the first state to legalize medical marijuana in 1996.
- Compassionate Use Act authorizes medical marijuana use for any physician-approved condition.
 - Cal. Health & Safety Code § 11362.5(b)
- Intended to ensure that patients and their primary caregivers are not subject to criminal prosecution or sanction. (§ 11362.5(b).)



aalrr 5

MEDICAL MARIJUANA

- *Ross v. RagingWire Telecomm, Inc.* (2008)
 - Employers do not need to accommodate marijuana use
 - California vs. Federal law

MEDICAL MARIJUANA IN CALIFORNIA

- Employers not required to accommodate medical marijuana use on employer property or premises or during working hours.
 - Cal. Health & Safety Code § 11362.785(a)
- Not a violation of public policy or FEHA to dismiss an employee from employment because of having tested positive for a chemical found in marijuana.
 - *Ross v. RagingWire Telecomm., Inc.*, (2008)
42 Cal.4th 920



RECREATIONAL MARIJUANA

- Adult Use of Marijuana Act (AUMA)
 - Passage in 2016
 - Legalizes use in California for anyone 21 or older



LEGALIZATION | PROHIBITIONS

CALIFORNIA PROPOSITION 64, MARIJUANA LEGALIZATION (2016)

Weed the People...
Proposition 64 was passed by
California voters 56.13% to 42.87%



SO IS MARIJUANA REALLY LEGAL, OR ARE YOU JUST BLOWING SMOKE?

- On November 8, 2016, Californians passed Proposition 64, legalizing recreational use of marijuana for adults 21 years or older. Specifically, it is no longer unlawful for a person 21 or older to possess, process, transport, purchase, obtain, or give away to persons 21 year of age or older without any compensation whatsoever, not more than 28.5 grams (1 ounce) of cannabis not in the form of concentrated cannabis.
 - California Health & Safety Code § 11362.1

HEALTH & SAFETY CODE § 11362.1

- California Law also allows individuals 21 years of age or older to:
 - Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older (without compensation) not more than eight grams of concentrated cannabis;
 - Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants;
 - Smoke or ingest cannabis or cannabis products; and
 - Possess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age without compensation.

PROPOSITION 64 PROHIBITIONS

- Although Proposition 64 legalized recreational use of marijuana, several prohibitions were codified in California Health & Safety Code § 11362.3, and went into effect on June 27, 2017.
 - No smoking or ingesting cannabis or cannabis products in a public place;
 - No smoking cannabis products in a location where smoking tobacco is prohibited;
 - No smoking cannabis or cannabis products within 1,000 feet of a school, day care center, or youth center while children are present, except in or upon the grounds or a private residence and only if such smoking is not detectable by others on the grounds of the school, day care center, or youth center while children are present;

PROPOSITION 64 PROHIBITIONS

- One cannot possess an open container or open package of cannabis or cannabis product while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation;
- One cannot possess, smoke, or ingest cannabis or cannabis products in or upon the grounds of a school, day care center, or youth center while children are present;
- No manufacturing of concentrated cannabis using a volatile solvent;

PROPOSITION 64 PROHIBITIONS

- No smoking or ingesting cannabis products while driving, operating a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation;
- No smoking or ingesting cannabis or cannabis products while riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.



WHAT DOES PROPOSITION 64 MEAN FOR EMPLOYERS?

- Since the passage of Proposition 64, many employers have been confused about what is legally allowable with regard to their rights as employers in contrast to the employees individual right to use recreational marijuana.

aalrr 17

WHAT DOES PROPOSITION 64 MEAN FOR EMPLOYERS?

- However, Proposition 64 did not amend, repeal, restrict or preempt:
 - The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law.
 - The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 within a building owned, leased, or occupied by the state or local agency.
 - The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 on the individual's or entity's privately owned property.
 - Law pertaining to the Compassionate Use Act of 1996.

“I’m still a bit hazy. This new law seems disjointed with federal authority.”

- Despite the passage of Proposition 64 in California, marijuana remains an illegal substance under the federal Controlled Substances Act.



STILL ILLEGAL UNDER FEDERAL LAW

- Cole Memo
- The Federal Controlled Substance Act (CSA)
- January 2018
- Attorney Jeff Sessions rescinded the Cole Memo
- Limited resources to enforce Federal law

WHAT DOES AUMA MEAN

- Does not amend, repeal or restrict Employers' rights to prohibit the possession or use of Marijuana in the workplace
- Same rights to promulgate restrictive policies
- Do not need to accommodate use
- Private owned or government building can offer greater prohibitions or conduct otherwise permitted under AUMA



DISCIPLINE FOR A POSITIVE DRUG TEST

- Not a violation of California FEHA to dismiss an employee from employment because of having tested positive for marijuana.
 - *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008)
- The Compassionate Use Act does not prohibit employers from discharging employees who fail drug tests due to marijuana use.
 - *In re Forchion* (2011) 198 Cal.App.4th 1284, 1313)

aalrr 23

PRIVATE SECTOR DRUG TESTING



LEGALITY OF WORKPLACE DRUG TESTING IS DETERMINED ON A CASE-BY-CASE BASIS

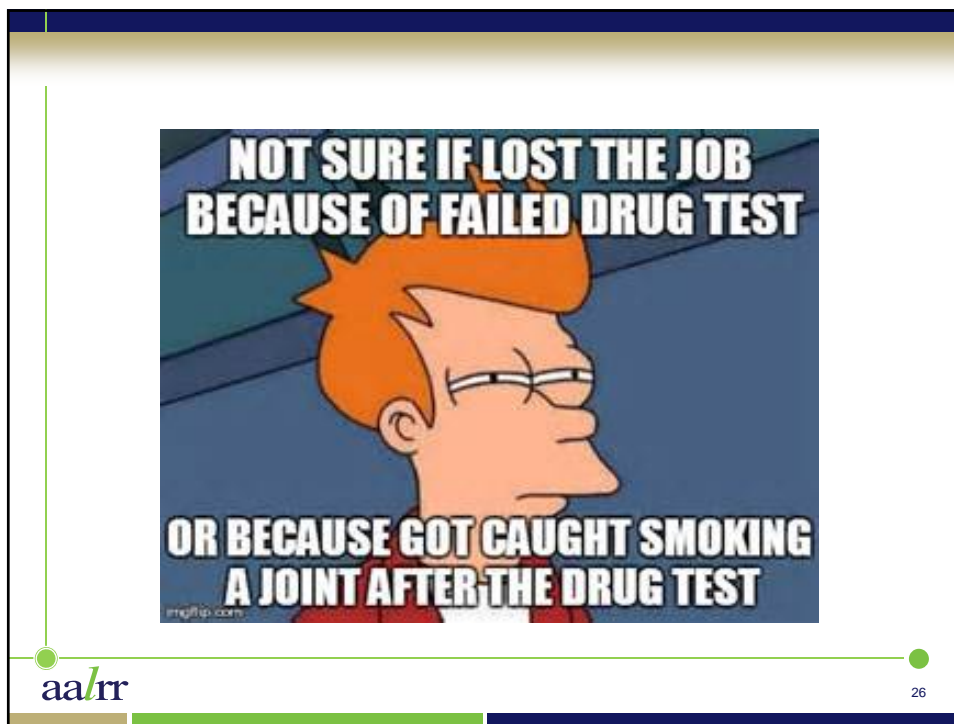
- Drug test's intrusion on employee's/applicant's reasonable expectation of privacy vs. employer's legitimate interest in regulating its employees' conduct

Kraslawsky v. Upper Deck Co., (1997) 56 Cal. App. 4th 179

- Courts consider:
 - Nature of the test
 - Equipment used
 - Manner of administration
 - Reliability of the test

DRUG TESTING





“REASONABLE SUSPICION” DRUG TESTING

- Employer may order employee to submit to drug and/or alcohol screening when employer has “reasonable suspicion” to believe that employee is under the influence of drugs or alcohol while at a work location, while on the job, or when reporting to duty.

aalrr 27

“REASONABLE SUSPICION” DRUG TESTING

- “Reasonable suspicion:”
 - Suspicion based on objective facts and reasonable inference drawn from articulable facts that an employee is under the influence of drugs and/or alcohol.
 - Facts may include characteristics of employee's appearance, behavior, mannerisms, speech or body odors.

IMPLEMENTATION OF DRUG TESTING POLICIES



- Establish a written policy that prohibits using or being under the influence of drugs or alcohol in the workplace.
- Explain the need for testing.
- Put the drug testing policy in as many places as possible so as to provide all employees with sufficient notice.

IMPLEMENTATION OF DRUG TESTING POLICIES



- Be as transparent as possible.
 - Hold meetings so that employees may ask questions regarding the policy and maintain an open door concerning an ongoing dialogue regarding the policy.
- Adhere strictly to the policy so as to lessen the likelihood of discrimination claims.
- Attempt to utilize the least intrusive means of drug testing.

IMPLEMENTATION OF DRUG TESTING POLICIES



- Utilize a reputable testing laboratory to perform the testing.
- Ensure that whoever conducts the drug test is fully independent of the employer and is properly licensed and qualified to conduct the test.
- If the drug test results are positive, to the detriment of the employee, give the employee the option of being retested at the employer's expense.

IMPLEMENTATION OF DRUG TESTING POLICIES

- Keep all test results confidential.
- Keep the test results separate from the employee's personnel files.
- Be consistent in implementing discipline as a result of a positive drug test.
- Ensure that whenever a drug test is required that there is a compelling business/governmental/public interest justifying that test.



RECENT DEVELOPMENTS

RECENT ACCOMMODATION OF MEDICAL USES

- July 2017
- Massachusetts Supreme Court
- *Barbuto v. Advantage Sales & Marketing, LLC* (2017)
- Zero-tolerance policy
- Should have engaged in the interactive process to determine if employee use could be accommodated and that the employee should not have to choose between treating a health condition and keeping a job



CONCLUSION

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36



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